Law Enforcement Digest

May 1998

LAW ENFORCEMENT MEMORIAL DAY - MAY 15

"…[They] have laid so costly a sacrifice upon the altar of freedom."

Abraham Lincoln, in a letter to
the mother of fallen soldiers.

HONOR ROLL

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Corrections Officer Academy - Class 266 - March 2nd through March 27th, 1998

Highest Overall: Kristina I. Hagman - King County Department of Adult Detention
Highest Academic: Cory R. Chartier - Pend Oreille County Jail
Highest Practical Test: Kristina I. Hagman - King County Department of Adult Detention
Highest in Mock Scenes: Dean Ramseyer - Airway Heights Corrections Center
Highest Defensive Tactics: Oscar A. Ramon - Washington State Reformatory

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Corrections Officer Academy - Class 267 - March 2nd through March 27th, 1998

Highest Overall: Darren M. Higashiyama - Kittitas County Sheriff's Office
Highest Academic: Donald R. Gann - King County Department of Adult Detention
Highest Practical Test: Kevin D. Charlton - Yakima County Correction/Detention Center
Highest in Mock Scenes: David R. Anderson - Cowlitz County Jail
Highest Defensive Tactics: John A. Arredondo - Airway Heights Corrections Center

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BRIEF NOTE FROM THE UNITED STATES SUPREME COURT

EMPLOYMENT LAW – DISCIPLINE OK FOR LYING DURING MISCONDUCT INVESTIGATION – In LaChance v. Erickson, 118 S.Ct. 753 (1998), the U.S. Supreme Court holds that a public agency employee may be disciplined for lying to the employer during an investigation into alleged misconduct by the employee. A federal appeals court had held, apparently on "due process" grounds, that in light of the pressures of the disciplinary investigation process, a federal agency may not discipline an employee for falsely denying the charges. The U.S. Supreme Court rejects this idea, noting that the employee can exercise his or her Fifth Amendment right against self incrimination by remaining silent if he or she believes that answering the agency's questions could result in exposure to criminal prosecution.

Result: Reversal of Federal Circuit Court of Appeals decision; case remanded for further disciplinary proceedings.

LED EDITOR'S NOTE: The LaChance case did not involve a police officer, and it did not involve the issue under Garrity v. New Jersey, 385 U.S. 493 (1967). Under Garrity, a government employer has a choice between: A) demanding a statement from an employee on a job-related matter, in which case the compelled statement is deemed to be "involuntary" , and the government may not use the involuntary statement in a criminal prosecution; or B) Mirandizing the employee as part of a criminal prosecution, in which case the employer may not discipline the employee for refusing to give a statement in the criminal investigation stage. Appropriate warnings must be given to reflect the government's choice at each stage of the process. LaChance would support disciplinary action for lying in either situation, however.

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BRIEF NOTE FROM THE WASHINGTON STATE SUPREME COURT

LEOFF II'S, LIKE LEOFF I'S, STILL MAY SUE THEIR EMPLOYERS FOR NEGLIGENCE – In Fray v. Spokane County, 134 Wn.2d ___ (1998), the State Supreme Court invalidates 1992 amendments to the Law Enforcement Officers' and Fire Fighters' Retirement Act (LEOFF), which amendments would have established employer immunity from negligence suits by LEOFF II officers (post 09/30/77 hires).

Ordinarily, injured workers may not sue their employers for mere negligence; they may sue only for intentional acts by the employer. That is because the Industrial Insurance Act governing most worker benefits claims provides immunity to employers from such negligence lawsuits. However, the Supreme Court states, up until 1992, the LEOFF statute in chapter 41.26 RCW had allowed both LEOFF I and LEOFF II officers to sue their employers for negligence. In 1992, in an attempt to eliminate the right of LEOFF II officers to bring such negligence lawsuits, the Legislature made a technical amendment in chapter 41.26 RCW.

In 1995, Fray, a Spokane County deputy sheriff, brought suit against the county, his employer, for alleged negligence in a 1993 incident. Fray had previously filed a workers' compensation claim for the same 1993 incident, and he had received disability benefits on that workers' compensation claim. The county claimed immunity from suit under the 1992 amendments to the LEOFF Act and under the general immunity provisions of the Industrial Insurance Act.

The trial court granted summary judgment to the county, but the Court of Appeals reversed. Now the Supreme Court has affirmed the Court of Appeals. The Supreme Court rules that: 1) the 1992 amendments to the LEOFF Act were technically defective and of no effect; and 2) the general immunity provisions of the Industrial Insurance Act, as presently written, do not apply to LEOFF claims, whether such claims relate to LEOFF I or LEOFF II officers.

Result: Affirmance of Court of Appeals reversal of Spokane County Superior Court summary judgment order for employer Spokane County; case remanded for trial.

LED EDITOR'S NOTE: The Division Three Court of Appeals decision in Fray was digested at June '97 LED:11. See also the Division Two Court of Appeals decision on the same issue in Elford v. City of Battle Ground, 87 Wn. App. 229 (Div. II, 1997) March '98 LED:20. The Fray Supreme Court decision preserves Mr. Elford's right to go to trial in his case.

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WASHINGTON STATE COURT OF APPEALS

GROUP FRISK, BACKPACK FRISK JUSTIFIED BY REPORT AND OBSERVATIONS

State v. Laskowski, 88 Wn. App. 858 (Div. I, 1997)

Facts and Proceedings: (Excerpted from Court of Appeals opinion)

> A police officer was dispatched to a potential vehicle prowl in the parking lot of an apartment complex in the late evening. When he arrived, he saw six teens matching the description of the suspects. He asked them to remove their hands from their pockets. Some did not comply until he repeated the request. He approached Laskowski, who appeared nervous answering his questions, wore a backpack, and refused the officer's request to look inside. The officer knew that

one of the boys had a criminal history involving weapons. He performed a quick patdown of each of them [*Court's footnote: Laskowski does not challenge the first patdown because nothing was found from it.*] and saw a live shotgun cartridge in one of the boy's open pocket. He did not patdown the backpack. The officer testified that because the shotgun cartridge heightened his safety concerns, he ordered the boys to form a line, kneel, and place their hands over their heads. He then patted down Laskowski's backpack and felt a long hard object which he believed to be a weapon. He opened the backpack and discovered a loaded sawed-off shotgun.

The juvenile court denied the motion to suppress the sawed-off shotgun. It found Laskowski guilty of unlawful possession of a firearm while under the age of 18, in violation of RCW 9.41.040. It sentenced him to 10 days detention and 24 hours of community service.

ISSUE AND RULING: Did the totality of suspicious circumstances justify the Terry patdown of Laskowski's backpack? (ANSWER: Yes) Result: Affirmance of Snohomish County Superior Court (juvenile court) adjudication for unlawful possession of a firearm.

ANALYSIS: (Excerpted from Court of Appeals opinion)

Officers can briefly stop and question persons who they reasonably suspect of criminal activity. When a stop is lawful, officers may perform a protective frisk if they reasonably believe that suspects are armed and dangerous.

The totality of the suspicious circumstances supported the officer's belief that Laskowski was armed and dangerous. We do not agree with Laskowski's argument that he was searched solely due to his proximity to his companions. Here, Laskowski was part of a group reported to be acting suspiciously, and the officer could reasonably consider all facts known or observed about any member of the group. "[A]ny reasonable basis supporting an inference that the investigatee or a companion is armed will justify a protective search for weapons."

This case is similar to Terry, where the suspicious conduct of the group "casing" a store for robbery justified a stop and frisk of each member. That officer did not have particularized suspicion distinguishing Terry from the others when the officer frisked him. Laskowski's reliance on State v. Galbert, 70 Wn. App. 721 (1993) **[March '94 LED:17]**, is misplaced. There, an officer refrisked a handcuffed person in a house immediately after the discovery of marijuana near the person. Because the second frisk was not based on a reasonable suspicion that the person was armed and dangerous, the court held it unlawful. Unlike Galbert, here there was reasonable suspicion that Laskowski was armed and dangerous.

We reject Laskowski's contention that the officer exceeded the scope of the Terry stop by not removing the backpack from Laskowski's reach without patting it down. This court declined to adopt this argument in State v. Franklin, 41 Wn. App. 409 (1985). It would be unrealistic to require an officer to remove the pack

in such a manner that a weapon would not be felt. Moreover, the risk to the officer's safety would continue once the pack was returned to the suspect.

A protective frisk may extend beyond a person to his or her area of immediate control "if there is reasonable suspicion that the suspect is dangerous and may gain access to a weapon." The same interests that justify a limited intrusion for a Terry stop allow an intrusion on a person's possessory interests in property in some circumstances. An officer is not restricted to frisking only a suspect's outer clothing, but may patdown articles of clothing not worn by, but closely connected to a suspect, where the officer reasonably believes a weapon is present therein. In State v. Keyser, 29 Wn. App. 120 (1981), the officer's frisk of a bag underneath the seat in a car was within the scope of a Terry search. A backpack, worn on Laskowski's back, was within his or his companions' immediate control. It is similar to a bag in a car or an article of clothing, and it presented the same risk to the officer's safety.

The backpack was the only place a shotgun could have been concealed. The officer was reasonably concerned that it might contain a shotgun which Laskowski or any of his companions could access because none of them were restrained during the stop. Given the potential risk of danger to the officer, the frisk of the backpack was reasonable and did not exceed the scope of a lawful Terry stop.

[Some citations and footnotes omitted]

"FRISK" OF VEHICLE OK BASED ON REASONABLE SUSPICION RE WEAPONS

State v. Larson, 88 Wn. App. 849 (Div. I, 1997)

Facts and Proceedings: (Excerpted from Court of Appeals opinion)

State Trooper David Scherf observed the defendant, Larry Larson, speeding in his pick up truck on Interstate 5 near Lynnwood. With lights flashing, Trooper Scherf maneuvered directly behind Larson, but Larson neither pulled over nor slowed down. Trooper Scherf observed Larson leaning forward and making movements toward the floorboard of his truck. After traveling some distance through a construction zone, Larson left the freeway and eventually stopped in a hotel parking lot.

At Trooper Scherf's direction, Larson got out of his truck. Trooper Scherf placed himself between Larson and the truck, patted down Larson's outer clothing, and was careful not to allow Larson back in the truck. Trooper Scherf then stuck his head in the cab of the truck through the open door to visually inspect the area around the driver's seat. It is undisputed that this intrusion and visual inspection inside the truck cab constituted a warrantless search.

In a pocket hanging down in front of the driver's seat, Trooper Scherf saw a syringe, blackened spoon and a cotton ball. Upon picking them up, he saw and opened a paper bindle containing heroin. Trooper Scherf arrested Larson for

drug possession. Larson waived his Miranda rights and admitted the heroin was his.

Trooper Scherf testified at the suppression hearing that if he had not found the drug-related items, he would have had Larson get back in the truck and would have proceeded with the usual activities involved in a traffic stop for speeding.

The trial court denied Larson's motion to suppress evidence of the contraband discovered when the trooper put his head inside the open door of the truck. Larson was convicted for possession of a controlled substance in a bench trial on stipulated facts.

ISSUE AND RULING: Was the limited search of Larson's vehicle for weapons lawful under the Washington State Constitution, article 1, section 7? (ANSWER: Yes) Result: Affirmance of Snohomish County Superior Court conviction for possession of a controlled substance.

ANALYSIS: The Court of Appeals begins its analysis of the "car frisk" issue by noting that in Michigan v. Long, 463, U.S. 1032 (1983), the U.S. Supreme Court held under Fourth Amendment analysis that a reasonable concern for officer safety will justify a "frisk" of a vehicle for weapons during a traffic stop or Terry seizure. The Larson Court then moves to the question of whether the Washington Constitution's article 1, section 7 similarly allows for car frisks.

The leading Washington case on point is State v. Kennedy, 107 Wn.2d 1 (1986), where the State Supreme Court allowed a car frisk in a Terry stop of a person reasonably suspected of being in possession of marijuana. The Larson Court describes the facts of the Kennedy case as follows:

A police officer observed Kennedy come out of a suspected marijuana dealer's house, get into a car, and drive off. Based on an informant's tip, the officer reasonably suspected Kennedy had just purchased marijuana inside the house. Lacking probable cause to arrest, the officer decided to stop Kennedy for the purpose of investigation.

After signaling Kennedy to pull his car to the side of the road, the officer saw Kennedy lean forward as if to put something under the driver's seat. Once both cars stopped, the officer approached Kennedy and asked him to get out. Kennedy got out and moved to the rear of the car. A passenger remained in the front seat. The officer looked in the car, reached under the front seat, and found a bag of marijuana. Kennedy was charged and convicted for possession of the marijuana.

The Kennedy court first concluded the stop of the vehicle was lawful under Const. art. I § 7 and Terry v. Ohio, as a detention for the purpose of investigation. The Court then defined the scope of a vehicle search incident to a Terry stop, and held that it could not be as intrusive as a search incident to arrest…

The Larson Court then analyzes the facts before it based on the Kennedy decision:

In the present case, as in Kennedy, the officer observed the driver making furtive movements as if placing a weapon under the seat. As in Kennedy, the trooper, after stopping the vehicle, had the driver step outside where he could be prevented from reaching back into the car while they continued their discussion. But unlike the facts in Kennedy, there was no other passenger in the car. Larson asks us to find this distinction dispositive, and hold Trooper Scherf's intrusion into the interior of the truck was unnecessary to assure his safety because even if there was a weapon inside, no one had access to it.

We do not find the distinction dispositive because here the stop was made for a different purpose than in Kennedy. In Kennedy, the purpose of the stop was to conduct an investigation. In the present case, the purpose of stopping Larson was to cite him for speeding, a minor traffic infraction. In stopping a vehicle for a minor traffic infraction, a police officer is authorized and expected to "detain that person for a reasonable period of time necessary to identify the person, check the status of the person's license, insurance identification card, and the vehicle's registration, and complete and issue a notice of traffic infraction." The certificate of license registration, by law, must be carried in the vehicle for which it is issued. Typically, this document is kept within the passenger compartment rather than on the driver's person. It was therefore reasonable for Trooper Scherf to anticipate that as he continued to carry out the traffic stop, sooner or later he would have to permit Larson to return to the truck to retrieve documents. Because Larson would then have had access to any weapon he might have concealed inside before getting out, the protective search to discover such a weapon was not unreasonably intrusive.

As in Kennedy, the purpose of such a search is "to discover whether the suspect's furtive gesture hid a weapon." The scope of the search, therefore is limited to the area of the vehicle defined by the suspicious movement observed by the officer. It is not coterminous with a search incident to arrest.

Because Trooper Scherf's concern for his safety was objectively reasonable, he acted lawfully in searching inside the truck, and his search was properly limited in scope. The drug paraphernalia was in plain view. The trial court did not err in refusing to suppress the evidence.

[Some citations and footnotes omitted]

LED EDITOR'S COMMENT: The prosecutor also argued in the Larson case that the search could be justified as a search incident to arrest. The prosecutor argued that the trooper had probable cause to make a custodial arrest for failure to stop or DUI. The Larson Court does not reject the theoretical grounding of this alternative argument, but the Court declares that the State waived the argument by failing to raise it at the trial court level.

"TRESPASSED" SHOPLIFTER COMMITTED BURGLARY WHEN HE SHOPLIFTED AGAIN

State v. Kutch, 89 Wn. App. 77 (Div. III, 1997)

Facts and Proceedings: (Excerpted from Court of Appeals opinion)

> Robert Kutch shoplifted from the Mervyn's store in the Yakima Mall on April 30, 1996. Mervyn's security guards arrested Mr. Kutch for the crime. They also handed him a written form notifying him that his invitation to enter the Yakima Mall, including Mervyn's, was revoked for one full year. The written notice also informed him that if he entered the mall during that year, he would be charged with criminal trespass. And if he shoplifted again he would be charged with second degree burglary. He signed the form.
>
> Six months later Mr. Kutch again entered Mervyn's, shoplifted clothing, but escaped. A week later Mr. Kutch again entered the store and shoplifted. This time he was arrested. The State charged Mr. Kutch with two counts of second degree burglary. The first count was dismissed pursuant to a plea bargain. The trial court found him guilty of second degree burglary on stipulated facts on the second count.

When a retail store owner revokes the invitation that stores make to members of the public, is this revocation sufficient to provide a basis for the "unlawful entry" requirement of second degree burglary? (ANSWER: Yes) Result: Affirmance of Yakima County Superior Court conviction of second degree burglary.

ANALYSIS: The Court of Appeals first explains that a retail store owner has the power to revoke the invitation that the store otherwise makes to members of the public. Distinguishing a prior case (State v. Blair, 65 Wn. App. 64 (Div. I, 1992) **Oct '92 LED:13** where a police officer had attempted to ban a person from a certain area, the Kutch Court holds that the store owner in the case before it could and did revoke the invitation to Kutch to enter the store.

Finally, the Kutch Court turns to the issue of whether entry to shoplift in violation of the revocation provided a basis for an "unlawful entry" finding to support a second degree burglary conviction:

> A person's presence may be unlawful because of a revocation of the privilege to be there. State v. Collins, 110 Wn.2d 253 (1988). And a person whose invitation has been expressly limited or revoked who exceeds that limitation, or contrary to the revocation enters the building with intent to commit a crime, "engages in conduct that is both burglarious and felonious." [State v. Thomson, 71 Wn. App. 634 (Div. II 1993) **[No LED entry]**]
>
> In McDaniels [39 Wn. App. 236 (Div. II, 1984) **Sept '85 LED:10**], a juvenile was convicted of second degree burglary for stealing a coat from a church, generally open to the public. The court concluded that his entry into the church was unlawful because immediately prior to the entry he had been told that the church was only open to those who were there to pray. Mr. McDaniels was not there to pray. He was asked to leave. That request ended his privilege to be in the church and resulted in his second entrance being unlawful for purposes of the burglary statute. Other states have reached similar results. In Ocean [an Oregon case **-- LED Ed.**] the defendant had been caught shoplifting at Fred Meyer. The store barred him from entering any Fred Meyer store. Seven months later he was again caught stealing in a Fred Meyer store. He was charged with burglary. The court in Ocean held he was "neither a business

> visitor nor a licensee when he entered the premises with an intent to steal, but a trespasser." "[H]e was not a member of the general public to whom the premises were open, even during business hours" because of the notice. The Oregon Court of Appeals upheld the conviction for burglary.
>
> For purposes of the unlawful entry element of second degree burglary, the prior notice given to Mr. Kutch effectively revoked his invitation to go into the mall premises.

[Some citations omitted]

"RECORDED RECOLLECTION" HEARSAY EXCEPTION APPLIES TO RECANTING WITNESS

State v. Alvarado, 89 Wn. App. ___ (Div. I, 1998) [949 P.2d 831]

Facts and Proceedings:

Within a few days of a murder, Lopez, a witness, gave police three tape-recorded statements. In the first statement, Lopez denied any knowledge of the crime. However, in the second and third statements, Lopez gave a detailed eyewitness account of the murder committed by two men. Also, in the second and third statements, Lopez explained that he had denied knowledge in the first statement for fear of retaliation.

At trial, however, Lopez claimed that he could not remember the incident, and that he could not verify the tape-recorded statement. The trial court allowed the tape recording to be played as a "recorded recollection" under the hearsay exception at Evidence Rule (ER) 803 (a)(5). [**LED Editor's Note: Defense counsel did not object at trial, and this case was reviewed on appeal as an issue of whether there was ineffective assistance by trial counsel in failing to object to this hearsay evidence.]** Michael Alvarado and Ramon Barrientes were convicted of first-degree murder.

ISSUE AND RULING: Were the tape-recorded statements of witness Lopez admissible under the hearsay exception for "recorded recollection" under ER 803 (a)(5) even though Lopez claimed at trial that he could not say whether or not the statements were true? (ANSWER: Yes) Result: Affirmance of King County Superior Court convictions of first degree murder.

ANALYSIS: The Court of Appeals begins its analysis by describing a four-part test under the "recorded recollection" hearsay exception of ER 803 (a)(5):

> The admission of statements under ER 803(a)(5) is proper when the following factors are met: (1) the record pertains to a matter about which the witness once had knowledge; (2) the witness has an insufficient recollection of the matter to provide truthful and accurate trial testimony; (3) the record was made or adopted by the witness when the matter was fresh in the witness' memory; and (4) the record reflects the witness' prior knowledge accurately.
>
> The recordings here are taped statements made within eight days of the murder. Their content establishes that Lopez had knowledge of the events when the recordings were made. At trial, he testified that he could not remember the

> events. The recordings are Lopez's own words and thus were made and adopted by him. The first three factors therefore are easily met.
>
> At issue here is satisfaction of the final factor: whether the recordings accurately reflect Lopez's prior knowledge. The rule itself prescribes no particular manner for answering this inquiry. Rather, the rule states the requirement passively, asking whether the record or memorandum has been "shown . . . to reflect {the witness' prior } . . . knowledge correctly." ER 803(a)(5).

Next, the Court discusses at length the mix of cases and debate among legal analysts on the question of whether ER 803 (a)(5) can apply to a witness like Lopez who recants or claims no memory at trial. The Alvarado Court ultimately holds that the rule can apply in this circumstance:

> We hold that the requirement that a recorded recollection accurately reflect the witness' knowledge may be satisfied without the witness' direct averment of accuracy at trial. The court must examine the totality of the circumstances, including (1) whether the witness disavows accuracy; (2) whether the witness averred accuracy at the time of making the statement; (3) whether the recording process is reliable; and (4) whether other indicia of reliability establish the trustworthiness of the statement.

Finally, the Alvarado Court explains as follows its reasoning in holding the Lopez statements admissible under ER 803 (a)(5):

> Turning to the facts of this case, Lopez never recanted or disavowed accuracy of the second or third statement, and he affirmatively asserted their accuracy at the time he made them. There was no suggestion that the tapes do not accurately reflect his statements. These facts all support admission of the second and third statements.
>
> Other indicia of reliability also support admission of the second and third statements. These two statements were given on the same day, eight days after the murder and only two hours apart. They are consistent with each other and reflect a detailed and fairly comprehensive knowledge of the crime. Lopez answered all questions lucidly and at no time suggested that he was unsure of what he remembered. After making the last statement, Lopez acknowledged on the tape that all the information was "true and correct." Finally, the contents of the later statements were corroborated in varying degrees by the physical evidence and testimony of the other witnesses, as well as by Alvarado's confession. But in his first statement, Lopez denied all knowledge of the crime, thus demonstrating that he is capable of lying. This alone does not render the second and third statements inadmissible. Lopez explained that he denied knowledge because he feared retaliation, a fear he referenced in both later statements. This same fear arguably explains his lack of memory at trial; Lopez did not want to testify and said that his family had ostracized him for giving the statements. The court was entitled to consider these circumstances when evaluating whether the later statements bore sufficient indicia of reliability. Under the totality of the circumstances, the court was justified in concluding that the second and third recordings accurately reflected Lopez's knowledge when

> they were made. The first statement does not have sufficient indicia of reliability because Lopez admitted that it was untrue. Nevertheless, the first statement was properly admitted under the rule of completeness, because the statement provided a context from which defense counsel could assail Lopez's credibility.

[Footnote omitted]

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BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) "MEDICAL DIAGNOSIS OR TREATMENT" HEARSAY EXCEPTION REQUIRES SOME LEVEL OF UNDERSTANDING BY PATIENT OF THE PURPOSE OF VISIT – In State v. Carol M.D. and Mark A.D., 89 Wn. App. 77 (Div. III, 1997), the Court of Appeals has held in a 2-1 decision that: 1) statements made by a nine-year-old victim to a counselor should not have been admitted by the trial court under the hearsay exception for statements made for medical diagnosis or treatment, because the record did not establish that the child made the statements understanding that the statements would further the purposes of the treatment; 2) the trial court should have granted defendants' request that funds be provided to hire an expert on child memory; 3) the trial court should have conducted a hearing to determine whether the lead police investigator and others had unduly pressured the child witnesses into accusing their parents of sexual abuse; 4) there was no due process violation in the investigators' destruction of their notes of interviews with an alleged victim; and 5) there was no due process violation where a mother charged with sex abuse was denied contact with her children pending trial, while the State's witnesses had frequent contact with the children.

In significant pertinent part, the Court of Appeals analysis of the issue under the "medical diagnosis or treatment" hearsay exception is as follows:

> ER 803(a)(4) excepts from the hearsay rule "[s]tatements made for purposes of medical diagnosis or treatment and describing . . . the inception or general character of the cause or external source [of symptoms] insofar as reasonably pertinent to diagnosis or treatment." The United States Supreme Court has ruled that admission of child abuse hearsay statements under ER 803(a)(4) does not violate the Confrontation Clause. White v. Illinois, 502 U.S. 346 (1992). The court held: "[A] statement made in the course of procuring medical services, where the declarant knows that a false statement may cause misdiagnosis or mistreatment, carries special guarantees of credibility that a trier of fact may not think replicated by courtroom testimony."
>
> Therapy for sexual abuse qualifies as medical treatment for purposes of ER 803(a)(4). Also, some courts have held a child's statements identifying the abuser as a member of his or her family are "reasonably pertinent to . . . treatment." ER 803(a)(4). These courts reason that the abuser's identity is relevant to determining the scope of the child's emotional and psychological injuries and the appropriate treatment.
>
> In Renville, [a federal court decision] the court identified two factors critical to the application of ER 803(a)(4): "[F]irst, the declarant's motive in making the statement must be consistent with the purposes of promoting treatment; and

second, the content of the statement must be such as is reasonably relied on by a physician in treatment or diagnosis." These two factors reflect the rationale for the medical purpose exception to the hearsay rule: The declarant has a strong motive to speak truthfully and accurately because his successful treatment depends upon it.

Here, the State filed a pretrial motion in limine to admit M.D.'s statements to Ms. Andrews under ER 803(a)(4). The prosecutor represented to the court that Ms. Andrews would testify that she tells children in the first counseling session that she is a therapist, and she explains what a therapist does. Further, the State represented that M.D. would testify she knew Ms. Andrews was her therapist. Over objection by the defense, the court ruled the statements admissible. The court noted it had observed M.D. during the pretrial hearings and was impressed with her intelligence. It appears the trial court regarded M.D. as mature enough to realize the importance of giving accurate information to her counselor.

At trial, Ms. Andrews testified as the prosecutor had indicated she would. After Ms. Andrews told the jury what M.D. said to her during the counseling sessions, the State called M.D. as a witness. M.D. testified she knew Ms. Andrews was her therapist. However, she also testified she did not know what Ms. Andrews was supposed to do.

Mr. and Mrs. D. argue the above record is insufficient to establish the basic trustworthiness of M.D.'s statements, as supported by her self-interest in receiving correct medical treatment. We agree that in the case of a child who has not sought medical treatment, but makes statements to a counselor procured for him or her by a state social agency, the State's burden under ER 803 is more onerous. The record must affirmatively demonstrate the child made the statements understanding that they would further the diagnosis and possible treatment of the child's condition.

In this case, Ms. Andrews testified only that her standard practice is to tell children who she is and what she does. She did not testify that she explained to M.D. her successful treatment depended upon her providing truthful and accurate information about what had happened to her. Absent such testimony, we will not assume that this nine-year-old was motivated to tell the truth by her self-interest in obtaining proper medical treatment.

Result: Reversal of Chelan County Superior Court child-sex offense convictions of Mr. and Mrs. D; remanded for re-trial.

(2) COMPUTER DISK IS "MAP" FOR PURPOSES OF "SCHOOL BUS STOP" UCSA SENTENCE ENHANCEMENT – In State v. Nunez-Martinez, 89 Wn. App.___ (Div. II, 1998) [951 P.2d 823], the Court of Appeals has addressed a question as to what constitutes a "map" for purposes of the UCSA sentence enhancement provision for drug delivery in proximity to a school stop. The court holds a computer disk to be a "map" as follows:

A defendant's presumptive sentence is enhanced by 24 months if he or she delivers a controlled substance within 1,000 feet of "a school bus stop as

> designated on maps submitted by school districts to the office of the superintendent of public instruction."
>
> Here, an employee of the Longview School District testified that the district sent a map to SPI in each year before 1995. In 1995, however, the District sent a computer disk that listed the longitude and latitude of each designated school bus stop. When converted to a printed document, the disk showed a school bus stop at 220 Baltimore Street, about 150 feet from the location of the delivery charged in Count V.
>
> In our view, the disk was a map for purposes of RCW 69.50.435(f)(3); it listed the precise location of each school bus stop, just as a map would have, so it was the equivalent of a map for all intents and purposes. It described a school bus route stop at 220 Baltimore Street, and an officer testified that Nunez-Martinez delivered about 150 feet from that location. The evidence was sufficient to support the enhancement, and the trial court did not err by imposing it.

[Footnote omitted]

Result: Affirmance of Cowlitz County Superior Court conviction and enhanced sentence for controlled substance delivery (three counts).

(3) CREDIFORD'S "IMPLIED ELEMENT" HOLDING CONFIRMED IN DUI CASE – In City of Seattle v. Norby and City of Seattle v. Burdge, 88 Wn. App. 545 (Div. I, 1997), the Court of Appeals confirms that the State Supreme Court decision in State v. Crediford, 130 Wn.2d 747 (1996) **March '97 LED:03** established an implied element for the DUI law's two-hour rule for BAC's at 0.10% or above. The Crediford implied element requires that the State prove that post-driving alcohol consumption did not affect the 0.10% BAC reading. Accordingly, the Court of Appeals rules in these two cases that it was reversible error for the trial court to fail in the "to convict" jury instruction to tell the jury about this element of this DUI offense. The jury should have been instructed that an amount of alcohol sufficient to cause the 0.10% reading within two hours of driving was present in defendant's system while he was driving.

Result: Reversal of Seattle Municipal Court DUI convictions; cases remanded for re-trial.

(4) NO DOUBLE JEOPARDY PROBLEM IN 1) CONVICTION FOR MIP AND 2) LICENSE SUSPENSION FOR DRIVING WITH ALCOHOL IN SYSTEM FOR SAME ACT – In Rowe v. DOL, 88 Wn. App. 781 (Div. III, 1997), the Court of Appeals rejects an argument that the trial court violated constitutional protections against double jeopardy by first convicting the 18-year-old Matt Rowe of MIP (RCW 66.44.270) and then suspending his license for driving with alcohol (.02 BAC) in his system (RCW 46.20.309) based on the same act. Citing cases raising similar issues, such as State v. McClendon, 131 Wn.2d 853 (1997) **Nov '97 LED:07** (no double jeopardy problem in prosecuting for DUI following issuance of probationary license based on BAC reading), the Rowe Court holds that the purpose of license suspension under RCW 46.20.309 is not solely punitive but instead serves an important remedial purpose. Accordingly, application of the latter statute following an MIP conviction does not violate double jeopardy, the Rowe Court rules.

Result: Reversal of Whatcom County Superior Court decision setting aside license suspension; reinstatement of DOL suspension order.

LED EDITOR'S NOTE: Double jeopardy claims of this sort, asserted in this case and the next case, tied to sanctions labeled "civil" by the Legislature, should eventually abate in light of the U.S. Supreme Court decision in Hudson v. U.S., 118 S.Ct. 448 (1997) March '98 LED:04.

(5) NO DOUBLE JEOPARDY PROBLEM IN 1) JUVENILE'S ADJUDICATION FOR SECOND DEGREE ASSAULT, AND 2) SUSPENSION FROM SCHOOL FOR SAME ACT – In State v. Knutson, 88 Wn. App. 677 (Div. I, 1997), the Court of Appeals rejects Joseph Knutson's argument that the juvenile court violated constitutional double jeopardy protections by adjudicating Knutson as guilty of second degree assault after he had been suspended from high school for five days based on the same act. Because school suspension serves a remedial purpose, such suspension is not constitutional punishment and therefore does not place the person in "jeopardy" for constitutional double jeopardy purposes, the Knutson Court holds.

Result: Affirmance of King County Superior Court juvenile offense adjudication of guilt for second degree criminal assault.

(6) NON-INDIAN FAMILY MEMBER DIDN'T LAWFULLY "ASSIST" FISHING BY ABSENT FAMILY MEMBER – In State v. Price, 87 Wn. App. 424 (Div. I, 1997), the Court of Appeals upholds the validity of RCW 75.12.320(2)(a), which prohibits a non-Indian family member of a treaty rights Indian from "assisting" the treaty rights Indian in exercising treaty fishing rights at an off-reservation catch site without the presence of the treaty rights Indian. The Price Court rejects defendant's argument the statute is an invalid regulatory burden on his wife's treaty fishing rights.

Result: Affirmance of Whatcom County Superior Court conviction of Glynn Tal Price (a non-Indian) for violating RCW 75.12.320(2)(a) by fishing in a treaty Indian fishery when his wife (an Indian) was not present.

(7) CONVICTION EXONERATED PRE-TRIAL BOND; OWNER OF BAIL BOND COMPANY LACKED AUTHORITY TO BIND THE SURETY ON A NEW BOND FOLLOWING HIS CONVICTION – In State v. French, 88 Wn. App. 586 (Div. II, 1997), the Court of Appeals rules in favor of an insurance company which had appealed from a trial court ruling forfeiting an appearance bond.

James Robert French owned a bail bond company. He was charged with a number of child sex offenses. Through his company he obtained authority, on a one-time-only basis, from a surety/insurance company to post a $75,000 bond to secure his appearance at trial. French appeared at trial and was convicted on multiple child sex offense counts. On the day the verdict was announced, the trial court scheduled a hearing for the next day to decide the terms and conditions of French's release pending sentencing. French was a no-show the next day, and the State subsequently sought forfeiture of the bond.

Under these facts, the Court of Appeals holds that the bonding company was not liable. First, the Court of Appeals rules that under RCW 10.64.025, as amended in 1989, the bail bond was automatically exonerated (i.e. no longer at risk) the moment when French's conviction was announced in court. Thus, as soon as the conviction was announced, the State needed to seek a further bond if it wanted assurance that French would appear at further proceedings.

Second, the Court of Appeals rules that there was no basis in the facts or the law for a conclusion that the surety company had authorized French to bind it regarding his continuing release following conviction.

Result: Reversal of Clark County Superior Court ruling forfeiting the bail bond.

(8) ARCHEOLOGICAL RESOURCE PRESERVATION ACT NOT VOID-FOR-VAGUENESS – In State v. Lightle, 88 Wn. App 470 (Div. III, 1997), the Court of Appeals upholds against void-for-vagueness challenge a statutory scheme which makes it a misdemeanor to knowingly remove, dig into, or damage any historic or prehistoric archeological resource or site, or remove any archeological object from such site. See RCW 27.53.040, 060.

Result: Reversal of Benton County Superior Court order dismissing charge for violation of RCW 27.53.060(1).

(9) DIGITALLY ENHANCING FINGERPRINTS OK FOR IDENTIFICATION PURPOSES UNDER FRYE STANDARD – In State v. Hayden, 89 Wn. App. ___ (Div. I, 1998) [950 P.2d 1024], the Court of Appeals holds admissible expert testimony that defendant Eric Hayden's fingerprints matched the latent fingerprints lifted from a murder scene. The expert had been able to make the identification only after the latent prints had been digitally enhanced. Use of digital enhancement is sufficiently accepted in the scientific community to meet the requirements of the 1923 Frye test for admissibility of scientific evidence [Frye v. U.S., 293 F.1013 (1923)].

Daniel Holshue, a King County print examiner, had been unable to match bloody palm and fingerprints found on a bed sheet at the crime scene. However, Holshue took the bedsheet to Erik Berg of the Tacoma Police Department. Using a digital image of the prints and computer software to improve the contrast between the prints and the cloth background, Berg was able to enhance the prints. Holshue was allowed to testify at trial (per the digital enhancement) that defendant's prints matched those left on the sheet.

The prosecution argued in Hayden that the Frye test should not even apply, because digital imaging technology has been around for many years and is not experimental. However, the Court of Appeals notes that usage of the technique has been only recently applied to fingerprint ID's and that there are no appellate court decisions on point. Accordingly, the Court applies the Frye test. However, the Court then finds the expert testimony admissible under that test, because digital image processing is generally accepted in the relevant scientific community.

Result: Affirmance of King County Superior Court conviction of first degree felony murder.

(10) NO RESTITUTION FOR VEHICLE DAMAGE IN HIT-AND-RUN CASE – In Walla Walla v. Ashby, 89 Wn. App. ___ (Div. III, 1998), the Court of Appeals rules that a trial court lacks authority to require that a person convicted of a hit-and-run offense pay restitution for damages to the hit vehicle. Restitution can be ordered only when there is a direct causation of the damages by the criminal act. The Court of Appeals rules in Ashby that there is not a sufficient relationship between the act of striking another vehicle and leaving the scene to establish the necessary causation link between the crime and the damages.

Result: Affirmance of Walla Walla County Superior Court order reversing City of Walla Walla municipal court restitution order.

(11) "JUVENILE" MEANS "UNDER THE AGE OF 21" FOR PURPOSES OF STATUTORY LICENSE-REVOCATION SCHEME OF RCW 46.20.265 – In Davis v. DOL, 89 Wn. App. ___ (Div. III, 1998), the Court of Appeals reverses a Superior Court decision which had erroneously directed that DOL not suspend the driver's license of a 19-year-old who had been convicted of possession of marijuana.

At issue in the case was the meaning of the word "juvenile" in the driver's license suspension scheme which requires suspension of the licenses of "juvenile(s)" who are convicted of certain drug and alcohol-related offenses. In the juvenile code, "juvenile" is defined in part as "a person under 18 years of age." In the license suspension provisions, however, the Legislature has manifested its intent to extend coverage of the statute to those who are under the age of 21. Accordingly, the license of Brett Davis must be suspended. The Court of Appeals also rejects a constitutional equal protection challenge by Davis in which he argued that he was being unfairly treated based on his age.

Result: Reversal of Grant County Superior Court order enjoining DOL from suspending the driver's license of Mr. Davis; dissolution of injunction ordered.

(12) ESSENTIAL ELEMENT OF ASSAULT ON LAW OFFICER IS KNOWLEDGE OF OFFICER'S STATUS – In State v. Filbeck, 89 Wn. App. 113 (Div. II, 1997), the Court of Appeals rules that an essential element of the crime of third degree assault is defined by RCW 9A.36.031 (1)(g) (*assault of a law enforcement officer performing official duties*) is the offender's knowledge that the victim of the assault was a law enforcement officer, and that the officer was performing official duties at the time of the assault. Because trial court jury instructions in Filbeck did not adequately explain the mental state element of assault of a law enforcement officer, the Court of Appeals holds that Filbeck's conviction must be reversed and her case re-tried.

Result: Reversal of Pacific County Superior Court conviction for third degree assault; remand for re-trial.

(13) "MONEY LAUNDERING" STATUTE DOES NOT REQUIRE PROOF THAT FINANCIAL TRANSACTION CONDUCTED WITH INTENT TO CONCEAL THE ILLEGALITY – In State v. McCarty, 89 Wn. App. ___ (Div. II, 1998) [950 P.2d 992], the Court of Appeals rejects defendant's argument that the "money laundering" statute, RCW 9A.83.020, includes an implied element of intent to conceal the illegal source of the funds.

The Court of Appeals describes the facts of the McCarty case as follows:

> On December 21, 1994, McCarty borrowed $5,000 in cash from a known drug dealer, Steven Conophy. On February 15, 1994, McCarty borrowed another $15,000 in cash from Conophy. Both loans were evidenced by promissory notes that reflected the amounts of the loans and the terms of repayment. At trial, Conophy testified that McCarty knew that Conophy's only source of income was from methamphetamine sales. Conophy also testified that the $5,000 and $15,000 that he lent to McCarty were profits from drug sales. McCarty used this money to purchase cars at car auctions.

McCarty was charged and convicted on two counts of money laundering under RCW 9A.83.020(1)(a) for conducting a financial transaction with known proceeds of unlawful activity. However, after the verdict was announced, the trial court granted defendant's motion for a new

trial on grounds that the jury should have been instructed that the "money laundering" statute has an implied element of "intent to conceal the illegal source of the funds." The prosecution appealed from that order for a new trial.

There is no "intent to conceal" element in the money laundering statute, the Court of Appeals holds, other than as relates to the special provisions relating to money laundering by attorneys. For money laundering by non-attorneys, all that need be proven is that the defendant: 1) conducted a financial transaction involving proceeds of certain specific unlawful activity, and 2) defendant knew that the proceeds had been the product of the specified unlawful activity.

Result: Affirmance of Thurston County Superior Court conviction for money laundering (two counts).

(14) PROHIBITION AGAINST "INTIMIDATING A PUBLIC SERVANT" NOT CONSTITUTIONALLY OVERBROAD – In State v. Stephenson, 89 Wn. App. ___ (Div. II, 1998) [950 P.2d 38], the Court of Appeals rejects defendant's challenge to the constitutionality of RCW 9A.76.180, which prohibits intimidation of a public servant.

Defendant David C. Stephenson had been convicted of two counts of second degree theft. In response, he had threatened to file, and then did file, a frivolous lien of $7,914,000 against two superior court judges who had been involved in his criminal prosecution (one had issued arrest warrants, while the other had presided over certain pre-trial proceedings). Defendant was subsequently convicted of two counts of intimidating a public servant in violation of RCW 9A.76.180. Defendant challenged his "intimidating" conviction on "free speech" grounds. He argued that the statute was unconstitutional, because its broad prohibition on a wide variety of "threats" was too broad. However, the Court of Appeals rules that, in light of its important purpose, the statute is sufficiently narrow to meet First Amendment free speech requirements.

Result: Affirmance of Kitsap County Superior Court conviction of two counts of intimidating a public servant.

(15) PASSENGER HAS STANDING TO CHALLENGE LAWFUL TRAFFIC STOP THAT TURNED INTO AN UNLAWFUL SEIZURE – In State v. Takesgun, 89 Wn. App. ___ (Div. III, 1998) [949 P.2d 845], the Court of Appeals rules that a motor vehicle passenger had standing to argue that his rights, as well as those of the driver, were violated when a police officer unlawfully extended a lawful traffic stop to investigate other matters for which there was no reasonable suspicion. The Court of Appeals does not provide enough factual description to explain why the extended seizure was unlawful, so we cannot comment on this aspect of the case. It appears that the prosecutor conceded the latter point for purposes of this case.

Result: Reversal of Yakima County Superior Court conviction for possession of cocaine.

(16) "DRUG HOUSE" STATUTE'S "USE" PRONG REQUIRES PROOF OF USE BY PERSONS OTHER THAN THE DEFENDANTS -- In State v. Fernandez, 89 Wn. App. ___ (Div. I, 1997) [948 P.2d 872], the Court of Appeals rules that the "use" prong of the "drug house" statute of the Uniform Controlled Substances Act requires proof of use by persons other than the defendants.

RCW 69.50.402(a)(6) prohibits "operating a drug house," providing in relevant part as follows:

> It is unlawful for any person . . . knowingly to keep or maintain any . . . dwelling . . . which is resorted to by persons using controlled substances in violation of this chapter for the purpose of **using** these substances, or which is used for **keeping** or **selling** them in violation of this chapter.

[Emphasis added]

The Court of Appeals points out that under this statute the State can prove a violation by showing that a defendant knowingly keeps a dwelling which is used to: 1) store drugs, or 2) sell drugs, or 3) use drugs. As noted above, the Court of Appeals holds that the "use" prong of the statute requires proof that someone else other than the defendant used drugs in the dwelling. Because there was no such proof in this case, and because there was no way to determine whether the jury verdict was based on 1) use, 2) sales, or 3) storage, the "drug house" jury verdict against defendants must be set aside.

Result: Reversal of Skagit County Superior Court drug house convictions of three defendants; affirmance of certain other UCSA convictions against three defendants; remand of case for possible re-trial and re-sentencing.

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NEXT MONTH

In the June **LED** we will begin our update of 1998 Washington legislative enactments of interest to law enforcement. The effective date of most enactments of the 1998 legislative session is June 12, 1998.

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